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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. [redacted] 63

ANDREW A. AUGUSTINE and SALVATORE J. AUGUSTINE,
Petitioners,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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ANDREW A. AUGUSTINE and SALVATORE J. AUGUSTINE, your petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 30, 1951.

OPINIONS BELOW.

The opinions of the court of appeals (R. 101-102, 103-104) have not yet been reported.

JURISDICTION.

The judgments of the Court of appeals were entered on March 30, 1951 (R. 102, 104). Petitions for rehearing were denied on April 20, 1951 (R. 122). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

As to both petitioners:

1. Whether, in order to sustain a conviction for willfully attempting to evade income taxes, in violation of Section 145(b) of the Internal Revenue Code, it is incumbent on the prosecution to prove the commission of a willful affirmative act by the defendant in addition to the mere filing of the false return.

As to the petitioner Salvatore J. Augustine:

2. Whether a conviction for willfully attempting to evade income taxes, in violation of Section 145(b) of the Internal Revenue Code, can be sustained on a finding that the defendant signed a return which he knew to be false, without any finding that he filed it with intent to evade the payment of the tax due.

STATUTES INVOLVED.

1. Sections 145(a) and 145(b) of the Internal Revenue Code, 26 U. S. C. 145(a) and 145(b), provide as follows:

> **§ 145. Penalties**
>
> **(a) Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, as-

sessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

2. Section 3748 of the Internal Revenue Code, 26 U. S. C. 3748, provides in pertinent part as follows:

§ 3748. Periods of limitation

(a) Criminal prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years * * *

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *

STATEMENT.

Petitioners were indicted in one count for willfully and knowingly attempting to defeat and evade income taxes, in violation of Section 145(b) of the Internal Revenue Code (*supra,* p. 3), in that they filed a false and fraudulent return on behalf of Augustine Construction Company, a corporation of which they were officers, which set forth the net income of the corporation for the year 1943 as $22,-265.45, with tax due thereon in the amount of $14,543.42, whereas the true net income of the corporation was $122,-265.45, with tax thereon of $61,928.23 (R. 4a-5a).

An identical indictment against Augustine Construction Company (Count II; R. 77-78) had earlier been tried; it resulted in a directed verdict of not guilty (R. 83-85) on the ground that it did not charge the commission of any act by the corporation (R. 81-82).

At the present trial, evidence was adduced which would warrant the jury in finding the following facts:

The petitioners Andrew A. Augustine and Salvatore J. Augustine were, respectively, President and Secretary-Treasurer of Augustine Construction Company, and, with the exception of a one-third of a qualifying share owned by a third party, each owned fifty per cent. of the corporation's stock (R. 29).

Andrew was the field man, spending most of his time at the company's field office at Bethlehem, Pa. (R. 51); he was rarely in the Philadelphia office (R. 51). Salvatore was in and out of the Philadelphia office, more out than in, spending perhaps half an hour or an hour per day there (R. 51-52).

In November and December, 1943, Corbetta Construction Company sent to Augustine Construction Company, its subcontractor (R. 26), two checks, for $60,000 and $40,000,

respectively, representing payments of retained percentages on the latter's Bethlehem job (R. 26-27, 91; Govt. Ex. 4-5). These checks were not reflected in the books of Augustine Construction Company (R. 26, 29, 40, 53) nor were they deposited in the banks where the company had its accounts (R. 30-31, 36, 53, 57). Instead, they were indorsed by Andrew on behalf of the company and deposited in Andrew's personal account in another bank (R. 27-30, 41, 43, 45-48, 52-53, 93-94).

Andrew drew several checks on that personal account (Deft. Ex. 1-8; R. 32-39). Two, aggregating $20,000, were paid to the company (Deft. Ex. 1-2; R. 33, 39). Two, aggregating another $20,000, made out to Salvatore, were cashed (Dept. Ex. 4, 6; R. 35-36, 39); these bore Salvatore's name among the indorsements thereon, but not in his handwriting in one instance (Deft. Ex. 6; R. 54-55). One, for some $17,000, was paid to an insurance company (Deft. Ex. 3; R. 34). And two others, for $10,000 and for $2,195, were paid to Salvatore (Deft. Ex. 5, 7) and were deposited in the latter's personal bank account (R. 39, 56, 57; Govt. Ex. 10, 11, 13).

The income and excess profits tax returns of Augustine Construction Company (Govt. Ex. 1, 2), which were signed by the petitioners as corporate officers (R. 57, 87-88, 97), were based on the company's books (R. 86, 88-89), and so did not reflect the $100,000 represented by the two checks from Corbetta Construction Company (R. 58-59). This resulted in a tax deficiency for Augustine Construction Company of $47,384.81 (R. 59).

The trial judge refused to give the following instruction requested by both petitioners (Typewritten transcript, pp. 205, 208; not printed):

> 6. Mere failure to return income and pay the tax on it, assuming that the taxpayer knew it was due, does not constitute the offense of wilfully attempting to defraud and evade the income tax.

The trial judge charged as to Salvatore, *inter alia* (R. 11a)

> If you find from the evidence and believe beyond a reasonable doubt that he knew that that was a false return, then you should find him guilty.

Nothing was said by the trial judge as to the necessity of the jury finding that Salvatore had any purpose to evade the tax in order to convict (cf. R. 9a-10a, as to Andrew).

The jury found both petitioners guilty (R. 2a). Andrew was sentenced to four months' confinement and to pay a fine of $2000, Salvatore to two months and $1000 (R. 3a). Both appealed (R. 4a) and were continued on bail pending appeal (R. 3a-4a). The court below affirmed as to both (R. 101-104), saying as to Salvatore (R. 101-102),

> He received a portion of the $100,0000.00 paid to the corporation represented by the checks hereinbefore referred to under such circumstances that the jury was entitled to find that he was committing a tax fraud upon the United States within the purview of the statute.

Petitions for rehearing filed on behalf of both petitioners (R. 105-121) were denied (R. 122).

REASONS FOR GRANTING THE WRIT.

The single point presented by this record in its present posture, viz., whether the trial court correctly instructed the jury as to the elements of the offense denounced by Section 145(b) of the Internal Revenue Code, for violation of which petitioners were convicted, has an importance far transcending the fate of those two individuals. For indications are not wanting that the Courts of Appeals have by imperceptible stages finally succeeded in wholly obliterating a vital distinction in the criminal provisions of the Internal Revenue Code which this Court had been required to redefine only a few years ago.

1. In *Spies* v. *United States,* 317 U. S. 492, it was squarely held that the difference between the misdemeanor denounced by Section 145(a), of willfully failing to pay taxes due, and the felony of willfully attempting to evade and defeat the tax, made criminal by Section 145(b), was that in the latter situation there must be proof of a willful affirmative act. Mr. Justice Jackson, speaking for a unanimous Court, said (317 U. S. at 499):

> "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

Petitioner's conviction of the felony in that case was reversed because of the failure there of the trial judge properly to instruct the jury as to the difference between Sections 145(a) and 145(b).

The distinction defined in the *Spies* case was reaffirmed in another decision at the same Term, *United States* v. *Johnson,* 319 U. S. 503, where it was again pointed out that the filing of a false return might only be a misdemeanor. Mr. Justice Frankfurter, for the Court, said (319 U. S. at 514-515):

> * * * the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 15th. That may only be a misdemeanor under § 145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by § 145(b), the much more comprehensive

> violation of attempting "in any manner to defeat and evade" the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion.

There, however, since the petitioner had conducted "an elaborately concealed illegal business" (319 U. S. at 517-518), the reversal of his conviction was in turn reversed.

2. Where the facts in a particular case reflect, either singly or in combination, the circumstances enumerated by way of illustration in the *Spies* opinion (*supra*, p. 7), commission of the felony denounced by Section 145(b) is of course established. E. g., *Cave* v. *United States*, 159 F. 2d 464 (C. C. A. 8), certiorari denied, 331 U. S. 847 (defendant kept no books); *United States* v. *Lange*, 161 F. 2d 699 (C. C. A. 7) (elaborate system of payroll padding, fictitious purchases, suppressed sales, false invoices, altered records); *Locke* v. *United States*, 166 F. 2d 449 (C. C. A. 5), certiorari denied, 334 U. S. 837 (defendant "resorted to various ingenious and nefarious scheme and subterfuges"); *United States* v. *Chapman*, 168 F. 2d 997 (C. C. A. 7), certiorari denied, 335 U. S. 853 (defendant's mode of carrying on his business operations was calculated to conceal their magnitude and prevent investigation thereof); *Myres* v. *United States*, 174 F. 2d 329 (C. A. 8) certiorari denied, 338 U. S. 849 (defendant kept no books, records, cancelled checks or check stubs, and destroyed numerous files); *Kirsch* v. *United States*, 174 F. 2d 595 (C. A. 8) ("the conviction did not rest alone upon the allegation and proof of a wilful filing of a false return falsely reporting taxes due"; proof of other affirmative acts in the record); *United States* v. *Hornstein*, 176 F. 2d 217 (C. A. 7) (defendant kept no books); *United States* v. *Rosenblum*, 176 F. 2d 321 (C. A. 7), certiorari denied, 338 U. S. 893 (elaborate scheme to defraud); *United States* v. *Raub*, 177 F. 2d 312 (C. A. 7) (same).

But in two of the cases just cited, the Eighth Circuit indicated that the mere filing of a return known to be false

constituted the offense denounced by Section 145(b). *Cave* v. *United States,* 159 F. 2d 464, 467; *Myres* v. *United States,* 174 F. 2d 329, 334, both *supra.* And in another, the Seventh Circuit, relying on a decision in the District of Columbia construing the local tax law (*Rick* v. *United States,* 161 F. 2d 897 (App. D. C.)), stated that a fraudulent return was always an attempt to evade a tax. *United States* v. *Rosenblum,* 176 F. 2d 321, 330, *supra.* Since, in all of these cases, there was ample proof of the other affirmative acts required by the *Spies* doctrine, these intimations could rise to no higher dignity than dictum. But recently the court below, on the strength of the foregoing expressions, has squarely held that the mere filing of a false return without more amounts to felony in violation of Section 145(b). *United States* v. *Croessant,* 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927. Thus the distinction defined with such precision in the *Spies* case has been completely eroded away. One decision in the Fifth Circuit looks strongly the other way (*Jones* v. *United States,* 164 F. 2d 398), though that may be distinguishable because of the emphasis therein on trial errors.

3. The court below draws a distinction between filing no return at all, which was the situation in the *Spies* case, and filing a willfully false return, which it considers a felony within Section 145(b). See *United States* v. *Croessant, supra,* 178 F. 2d at 97. But this facile distinction reads the misdemeanor provision too narrowly. Section 145(a), *supra,* pp. 2-3, penalizes not only failure to make a return, it covers as well one "who willfully fails to pay such estimated tax or tax". Obviously one who knowingly files an inaccurate return is guilty of willfully failing to pay his tax (Section 145(a)), and so he, equally, "willfully attempts in any manner to evade or defeat any tax" (Section 145(b)). What, then, is the distinction? We submit that, here also, the only proper distinction between felony and misdemeanor in tax cases is that laid down by the *Spies* case: For felony, there is required some willful

affirmative act in addition to the omission to file or pay what the law demands.

The list of affirmative acts catalogued in the *Spies* opinion would have no significance in a no-return case otherwise. It is true, as the court below said in the *Croessant* case, *loc. cit. supra,* of one who files a false return—

> Not only has he created the appearance of complying, but that apparent compliance stands a good chance of remaining unattacked, for the tax authorities cannot possibly audit every taxpayer's return every year.

But, *a fortiori,* the tax authorities have an appreciably smaller chance of detecting the person subject to tax who files no return at all; as to him, they have not even the starting point of a clue.

The distinction suggested by the court below is thus obviously unsound; the correct demarcation remains the one so carefully drawn by this Court in the *Spies* case.

4. The difference between felony and misdemeanor is vital to the present petitioners because if, as they contend, what they did could not possibly have involved more than the misdemeanor set out in Section 145(a), then the present prosecution was barred by limitations. Since the indictment was found more than three years though less than six years after the offense charged, only the prosecution for felony would have been timely. R. 4a-5a; see 28 U. S. C. 3748 (*supra,* pp. 3-4).

5. The gravamen of petitioners' contentions here is that the trial judge's charge failed to reflect the distinction made by this Court in the *Spies* case. He refused to give, either in substance or effect, the following instruction requested by both petitioners (Typewritten transcript, pp. 205, 208; not printed):

> 6. Mere failure to return income and pay the tax on it, assuming that the taxpayer knew it was due, does not constitute the offense of wilfully attempting to defraud and evade the income tax.

Moreover, with respect to the petitioner Salvatore J. Augustine, the trial judge omitted all reference to intent to evade, and made that petitioner's guilt turn entirely on knowledge alone (R. 11a):

> If you find from the evidence and believe beyond a reasonable doubt that he knew that that was a false return, then you should find him guilty.

In this respect the instruction was far more harmful than the one dealing with the petitioner Andrew J. Augustine, where the judge at least made some mention (R. 9a-10a) of "knowingly and willfully concealed" and of "for the purpose of attempting to evade the payment of tax due by the Augustine Construction Corporation." The charge was generally—and prejudicially—erroneous for failure to define the elements of the offense as set forth in *Spies* v. *United States*, 317 U. S. 492, but it was particularly damaging as to Salvatore because of the complete omission of any reference to intent. So far as Salvatore was concerned, the trial judge also obliterated the traditional distinction between a return that is fraudulent and one that is merely false.

6. The present case strikingly illustrates the consequences which follow the erosion of boundaries heretofore delimited with care and precision by this Court. The requirement of an affirmative willful act, laid down in the *Spies* case, has been whittled away by verbal changes, until here it is abandoned so completely that a mere inference of knowledge of falsity, without more, is held to support conviction on a charge of felony brought long after the misdemeanor had been outlawed. The considerations that impelled review in the *Spies* case, see 317 U. S. at 492-493, and s. c. below, 128 F. 2d 743 (C. C. A. 2)—the need for clarifying and restating the scope of an important federal statute in the face of diverse and beclouding interpretations and obviously incorrect instructions to the jury—are fully applicable here.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1951.

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